

**MINUTES
of the
THIRD MEETING
of the
WATER AND NATURAL RESOURCES COMMITTEE**

**August 28-29, 2007
Sagebrush Inn Convention Center
Taos**

The third meeting of the Water and Natural Resources Committee was called to order on August 28, 2007 at 10:10 a.m. by Senator Phil A. Griego, chair, in the Chamisa Room of the Sagebrush Inn Convention Center in Taos.

Present

Sen. Phil A. Griego, Chair
Rep. Paul C. Bandy
Sen. Sue Wilson Beffort
Rep. Ray Begaye
Sen. Mary Jane M. Garcia
Sen. Clinton D. Harden, Jr.
Rep. Dona G. Irwin
Rep. Larry A. Larrañaga
Rep. Kathy A. McCoy
Sen. Steven P. Neville
Sen. Mary Kay Papen
Rep. Mimi Stewart
Rep. Don L. Tripp

Advisory Members

Sen. Rod Adair
Sen. Vernon D. Asbill
Sen. Carlos R. Cisneros
Rep. Anna M. Crook
Rep. Candy Spence Ezzell
Sen. Gay G. Kernan
Rep. Ben Lujan
Sen. Cisco McSorley
Sen. John C. Ryan
Rep. James R.J. Strickler
Rep. Peter Wirth

Guests

Rep. Roberto "Bobby" J. Gonzales
Rep. Jimmie C. Hall
Sen. Richard C. Martinez

Absent

Rep. Andy Nunez, Vice Chair
Rep. Elias Barela
Rep. Joseph Cervantes
Sen. Dede Feldman
Sen. Cynthia Nava

Rep. Nora Espinoza
Sen. Timothy Z. Jennings
Rep. James Roger Madalena
Rep. Danice Picraux
Sen. Leonard Lee Rawson
Sen. Nancy Rodriguez
Rep. Henry Kiki Saavedra
Rep. Eric A. Youngberg

Staff

Gordon Meeks
Jon Boller
Jeret Fleetwood

Tuesday, August 28

Mayor Bobby Duran welcomed the committee to Taos and thanked members for holding the meeting there.

The committee thanked the staff of the Sagebrush Inn for their work in preparing the facility for the committee's meeting.

Members of the committee introduced themselves to the audience.

Senator Griego asked members of the audience who were attending the committee on behalf of an acequia or acequia association to introduce themselves.

Acequia Perspectives on Active Water Resources Management

Fred Waltz, an attorney representing several acequia associations, provided the committee with testimony regarding the implementation of the Office of the State Engineer's (OSE) Active Water Resources Management Program (AWRM). He explained that while the program seems to be well-intentioned, it appears to be very problematic and often unworkable. Mr. Waltz went on to note that while the adjudications process seems painfully slow, it still provides due process protections for water rights owners that AWRM does not. He went on to predict that AWRM would be challenged in courts across the state and noted that acequias have been allocating their own water among themselves for hundreds of years without the help of programs such as AWRM.

Mary Humphrey, another attorney representing acequia associations, provided the committee with a brief history of court challenges to AWRM. She noted that in 2005, a court challenge to the program led to a judge's ruling that the legislature had failed to provide meaningful standards that would make the statute enabling AWRM constitutional. She also provided the committee with a timeline of litigation regarding AWRM, pointing out that after Judge Reynolds made his ruling regarding AWRM, the OSE issued a press release saying that the court had validated the program. However, she also pointed out that the OSE has sought to appeal the ruling, saying that it guts AWRM. Ms. Humphrey went on to note that the court of appeals heard oral arguments in the case on August 22, and that while she does not know how the case will turn out, the court of appeals' ruling will apply across the state, while Judge Reynolds' ruling may not.

David Benavides, another attorney representing acequia associations, provided the committee with his perspective on AWRM. He explained that while New Mexico's laws protect

senior water rights holders, such as many acequia users, AWRM seems to erode some of those protections. Mr. Benavides indicated that the provision allowing for water replacement plans in AWRM is one such method of undermining the protections offered to senior water rights holders. For example, he noted that a 2003 law passed by the legislature says that bylaws passed by acequia associations regarding water rights transfers must be honored by the OSE, which he explained forms a good framework for protection of senior water rights holders. However, Mr. Benavides pointed out that AWRM's replacement plans are actually water rights transfers without several of the legal steps involved in formal transfers, which could cause problems for senior water rights holders who would protest a formal transfer but may not be able to protest a replacement plan that could curtail use.

Mr. Benavides went on to explain that while the OSE worked with various water stakeholders in developing its statewide AWRM regulations, many important elements of the statewide regulations were left out of the district-specific regulations, such as hydraulic head and efficient watering methods necessary for acequias to continue to operate. Mr. Benavides also noted that the OSE's emphasis on metering of water users and insistence on issuing keys to acequia headgates to OSE employees seems problematic, too. He pointed out that acequia users have been equitably distributing water among themselves for hundreds of years without government employees being involved and questioned why senior users would need keys to get to their water when it seems more likely that junior users are the ones whose use would need to be curtailed.

In response to a question from the committee, John D'Antonio, state engineer, provided the committee with responses to the concerns raised by Mr. Waltz, Ms. Humphrey and Mr. Benavides. He explained that the legislature recognized the problems involved with managing water rights when it passed the law mandating AWRM in 2003. Mr. D'Antonio went on to explain that even though water rights adjudications take time, the OSE's actions, such as metering and appointment of water masters, will help it further adjudicate New Mexico's water resources. Mr. D'Antonio went on to note that the court ruling on AWRM was an exercise in due process and pointed out that due process protections are built into the AWRM regulations, too.

Questions and comments included:

- reasons for the creation of AWRM;
- reasons that water adjudications take so long to complete;
- the amount of water in New Mexico controlled by acequia associations;
- water rights transfers from senior users to junior ones and the desirability of senior water rights;
- how water replacement plans can help junior users who might otherwise have their use curtailed;
- whether recent protections for acequias enacted by the legislature are negated by AWRM;
- water rights transfers above and below Otowi Gauge;
- sales of water rights in the Taos area and their effect on the water landscape as a

- whole along the Rio Grande;
- impact of replacement plans on acequias;
- advantages and disadvantages of water use metering; and
- the value of communication and compromise when developing regulations such as AWRM.

The committee toured local acequias and diversion dams. Tour guides emphasized the importance of getting state funding to help maintain water infrastructure.

Water Transfers and Water Markets: Impacts on Acequias

Mr. Benavides and Paula Garcia, director of the New Mexico Acequia Association, provided the committee with testimony regarding the impacts of water markets and water transfers on acequias. Ms. Garcia began by noting that many people have reached the conclusion that fully adjudicating New Mexico's water resources will solve problems, but she cautioned that many issues remain to be resolved. For example, she explained that there are both short- and long-term concerns regarding water rights transfers. Ms. Garcia began discussing the concerns over water rights transfers by explaining that the physical impacts of water transfers are still relatively unknown. For example, she pointed out that it is impossible to tell how many water rights can be transferred out of an acequia system before that system will cease to work properly because of a lack of hydrologic pressure. Ms. Garcia went on to note that although the OSE considers water in acequias to be fair game for transfers, there are protections built into the law for acequias that OSE regulations should not be able to circumvent.

Ms. Garcia went on to discuss the transfer of water rights below Otowi Gauge. She explained that the gauge has been the de facto point of protection for water users in the north, pointing out that a memorial passed by the legislature discouraged the transfer of water rights from above the gauge to below it. However, she went on to indicate that a proposed water rights transfer involving a local ranch may circumvent the protections afforded to acequia users, which is a cause for concern among such users because of both the immediate concerns about the effect such a transfer will have on local water systems and the long-term implications of allowing such transfers to occur.

Mr. Benavides began by indicating to the committee that he believes there is no more difficult issue for policymakers to have to decide upon than market value versus cultural value, which in many ways is at the heart of the struggle over water in northern New Mexico. He explained that while water is the basis for survival of New Mexico's communities, many of those communities simply cannot afford to compete with developers for water rights. Mr. Benavides went on to point out that communities in California and along the Arkansas River in Colorado have been wiped away because they could not protect their water rights. However, he also noted that New Mexico has been able to stand up to more economically and politically powerful entities, such as California and Texas, to protect its own water, so there must be some belief here in the cultural value of water. Mr. Benavides emphasized that policymakers in New Mexico are going to have to identify ways to protect that cultural significance and allow the market to operate around those protections.

Questions and comments included:

- how little interest is shown by newcomers to New Mexico in preserving cultural traditions regarding water;
- a need to protect the storage of water, such as at Cabresto Dam;
- where the pressure to transfer water rights out of acequia systems is coming from; and
- issues related to the OSE's decision to breach Cabresto Dam.

Mutual Domestic Water Consumer Association (MDWCA) Issues

Andy Madrid of the Sangre de Cristo MDWCA, Ted Trujillo of the Greater Chimayo MDWCA and Roman Lucero provided the committee with testimony regarding the history, makeup and challenges faced by MDWCAs in New Mexico. They explained that there are about 650 such associations operating in New Mexico, serving mostly small rural communities, with a few regional systems serving over 1,200 households. The group also explained that many MDWCAs were organized under the Sanitary Projects Act in 1947, which was enacted in response to a public health crisis created by small rural communities getting their drinking water from ditches, streams and shallow wells. However, they noted that construction standards at the time most of the MDWCA systems were built did not account for meters, shut-off valves or today's drinking water standards. As a result, the group noted that over 200 MDWCA water systems have been found to be in violation of primary drinking water standards.

Another challenge noted by Mr. Madrid, Mr. Trujillo and Mr. Lucero is that many MDWCAs simply do not have the technical, operational, financial or managerial training to provide for long-term sustainability. For example, most MDWCAs do not have the technical resources to be able to complete five-year financial plans, adequate rate structures, asset management plans or full compliance with state regulatory requirements.

Mr. Madrid, Mr. Trujillo and Mr. Lucero went on to explain that another problem facing MDWCAs is that, unlike larger municipal water systems, the associations do not have an adequate tax base, bonding capacity or large number of users to be able to generate sufficient funding. They noted that without a dependable revenue stream, most MDWCAs cannot hire operators, bookkeepers and other necessary staff or maintain and repair existing infrastructure.

Questions and comments included:

- creation and membership of the Water Trust Board;
- the amount it would cost MDWCAs to come into compliance with drinking water standards;
- legislative oversight of the Water Trust Board;
- whether the councils of government could be helpful to MDWCAs; and
- the need for a liaison between MDWCAs and state agencies.

The committee recessed at 5:00 p.m.

Wednesday, August 29

Acequia Construction Program Task Force Recommendations

Ms. Garcia addressed the committee about the Water Trust Board and the proposal to create an office of water infrastructure development and centralize funding review and approval of water projects. Ms. Garcia introduced the partners in the Acequia Construction Program Task Force. She stated that the state/federal partnership has leveraged \$24 million in federal matching funds for acequia infrastructure since 1987. However, the current demand for new acequia infrastructure, or improvements to existing infrastructure, has increased substantially from five requests to 119 requests in the past five years. Ms. Garcia made the following suggestions to the state legislature: continue the Acequia Construction Program Task Force, implement staged construction projects, create an acequia construction fund and provide technical assistance.

Questions and comments included:

- inquiries about the waiting list for acequia projects;
- income to the New Mexico Irrigation Works Construction Fund (NMIWCF);
- bureaucratic red tape attached to the NMIWCF;
- how water funding has similar problems to educational funding; ideally it should be from one dedicated fund;
- who would prioritize projects for funding;
- controlling money in a fund so that it is spent on its intended projects;
- whether board membership should administer an acequia fund;
- the percentage of NMIWCF spent on acequias compared to other irrigation projects;
- who determines priorities;
- composition of the Acequia Construction Program Task Force;
- groups coming into the program feel overwhelmed;
- power and interest of the Interstate Stream Commission;
- depletion of the NMIWCF for other programs than irrigation projects;
- technical assistance to acequias;
- the creation of acequia associations;
- the role of the Army Corps of Engineers;
- the total amount of money for soil and water conservation districts; and
- relocation of the Natural Resources Conservation Service offices and consolidation of farm service agencies' effect on rural residents who need those services.

Taos Valley Draft Water Agreement

Governor Gilbert Suazo of the Pueblo of Taos addressed the committee on the ancient uses and occupation of the valley and threats to the water. He also discussed the history of the *Abeyta* lawsuit. He discussed the seven parties involved and how these parties ultimately came to a resolution regarding the water rights after 17 years.

Mr. Waltz said that there are currently 55 acequias in the Taos Valley. There are 12,000 acres of irrigated land and 7,000 *parciantes*. Some of the benefits of the Pueblo of Taos water rights settlement include mechanisms for the protection of the buffalo pasture, a sacred pueblo wetland that is a source of water for the pueblo and its neighbors; protection of the 55 acequias; agreement among the water rights-owning parties to offset surface water depletion effects; and a

system to allow future water supply needs of non-Indian municipal water providers to be met by the use of the Rio Grande offset water.

Palemon Martinez from Taos Valley discussed the partnership process and said that he appreciates the legislature's role. Mr. Martinez then introduced Donovan Gomez, a tribal administrator. Mr. Gomez said that the roads in his community are dry, dusty and muddy, and the drainage system needs to be improved. He said that there are five divisions of pueblo tribal government and natural resources is one of them. He stated that both the draft water settlement and the land use plan are important. Mr. Gomez also requested money for capital improvements on pueblo land.

Questions and comments included:

- whether *Abeyta* parties plan to market water outside the valley;
- sustainability of the settlement;
- the effect of deep wells and domestic wells;
- the status of state appropriations for the settlement (\$3 million in last year's appropriations for Taos; the governor will request a similar amount this year);
- the number of Indian settlements;
- earmarking of money for Indian settlements;
- to whom does the OSE report;
- a report to the committee on Indian water rights;
- public hearing and public participation in arriving at the settlement; and
- \$75 million appropriated in 2006 for Indian settlements, but vetoed.

Taos Regional Water Plan

Simeon Herskovits, an attorney and member of the Public Welfare Subcommittee, and Rudy Pacheco of the Taos Regional Water Planning Committee provided the Water and Natural Resources Committee with testimony regarding the Taos Regional Water Plan. Mr. Herskovits began by noting that Taos is the last region in New Mexico to complete its regional water plan. He went on to explain that the region includes Taos County and some areas in northern Rio Arriba County, such as Dixon and Embudo. Mr. Herskovits then discussed the formation of the regional water plan, which began with stakeholder meetings, subcommittees and the development of a draft plan in April 2006.

Mr. Herskovits went on to note that public comment on the draft plan has resulted in some changes, but that the public welfare statement has been the cause of most of the delay in completing the plan. He stated that while a public welfare statement needs to be included in the regional plan so that it will be part of the statewide water plan, there has to be some kind of specificity about it, or a mechanism to insure it, for it to be of any practical use. Mr. Herskovits indicated that while such a statement is currently being worked out, it is still in flux. He said that he expects it to be finalized within a few weeks, at which time he would transmit it to the committee.

Mr. Pacheco provided the committee with an overview of the way cultures have changed

in both the Taos Valley and America as a whole, and how such changes relate to water rights. He pointed out that the Taos Valley used to be an agricultural center of New Mexico and that while there are still a large number of farmers in the area, there simply is not the focus on farming and livestock that there used to be. Mr. Pacheco noted that many families who raise cattle today do it in addition to their other jobs. He went on to note that many of the residents of the Taos Valley were concerned that their water rights were going to be captured and marketed and emphasized that the Taos Valley Water Plan helped to ensure that such citizens, and those with a sense of the culture that has existed in the valley for centuries, had in a say in their water future.

Questions and comments included:

- continuous development of regional water plans;
- the effect that the creation of the department of water infrastructure may have on regional water plans; and
- participation by state government in development of regional water plans.

On a motion made, seconded and approved, the minutes of the July 16 meeting were approved as submitted.

The full committee adjourned at 11:40 a.m., at which time the Water Adjudications Subcommittee met.

Water Adjudications Subcommittee

Peter White, an attorney, began by providing the subcommittee with a brief history of water adjudications in New Mexico. He explained that there are also several goals involved in adjudication suits: to gain quiet title to water rights, to prohibit illegal water use, to determine the amount of unappropriated water, to administer water rights by direct flow and priorities and to establish certainty in water supply and demand.

Mr. White went on to discuss the problems associated with adjudications, which he said mainly fall into two categories: procedural and substantive. Examples he gave of procedural problems included: limited staff at the Office of the State Engineer (OSE) requires prioritization; coordination of hydrosurveys with legal proceedings; and problems communicating with defendants. Mr. White noted that examples of substantive problems with adjudications are the difficult legal issues surrounding Native American and non-Native American water rights, domestic wells and the duty of water.

Finally, Mr. White noted that, after 1992, a power vacuum had been created in the realm of water adjudications. He explained that former State Engineer Steve Reynolds held too much power, and that after he left the post, successive administrations of weak attorneys general and governors made solving the many problems associated with water and adjudications even more difficult. He went on to note that the complexity of problems along the middle Rio Grande, coupled with new uses by pueblos along the river, would require a strong hand if they were ever to be solved.

Victor Marshall, a former state senator and attorney, provided the subcommittee with testimony regarding water law in New Mexico, particularly with regard to adjudications and the San Juan River. He began by stating that although he is relatively new to water law, it appears not to work correctly in New Mexico. He went on to indicate that while New Mexicans spend a great deal of time discussing issues relating to the Rio Grande and Pecos River, most of the surface water in New Mexico, 60% by his estimate, comes from the San Juan River. Mr. Marshall went on to note that the proposed Navajo settlement would give 56% of that water to the Navajo Nation, which would create a crisis for thousands of other New Mexicans. He also discussed the numerous parties who are opposed to the settlement and their various objections to it.

Mr. Marshall went on to discuss his perception of the problems associated with adjudications, and water law in general, in New Mexico. He began by indicating that it is extremely difficult to get reliable information from the OSE. Mr. Marshall also pointed out that New Mexico is constantly threatened by Native American water rights claims, for which there simply is not enough water, or money, to satisfy them. He also noted that water law in New Mexico has become a narrow, specialized area dominated by a few expert attorneys, which usually results in an unhealthy situation for any branch of law.

Finally, Mr. Marshall cautioned that the answer to New Mexico's water problems is not to give more power to the OSE, but rather for the legislature to commission its own study to answer the basic question of how much water New Mexico has.

David Benavides, another attorney, provided the subcommittee with testimony regarding adjudications in New Mexico. He began by acknowledging that the fundamental question most people seem to ask is why adjudications take so long to complete. Mr. Benavides went on to provide the subcommittee with two anecdotes regarding adjudications to show that some adjudications go smoothly while others do not.

The first account Mr. Benavides provided concerned an adjudication of a section of the Rio Chama, along a tributary to the river. There, Mr. Benevides noted that 136 out of 140 property owners were able to complete their adjudications in about three years. He said this was possible because of the high level of communication between involved parties, because the meetings in the field office were scheduled so that everyone involved could attend, because there was no inclusion of priority dates in the discussions and because necessary technical work was performed while other legal assessments were being made. Mr. Benavides also acknowledged that such a quick adjudication was possible in part because there were no pueblo water rights claims on the river and because it involved a very small section of the river with a relatively low number of involved parties.

Mr. Benavides contrasted the adjudication on the Rio Chama with the ongoing one on the Gallinas River near Las Vegas, which he said began in 1991 and still is not resolved. He explained that one of the reasons it has taken so long is because even though attorneys for stakeholders requested meeting scheduling similar to that of the Rio Chama adjudication, the OSE resisted. He also noted that the OSE did not appear to want to separate priority dates from the rest of the discussion or to want acequia attorneys to be present at the field office set up for the adjudication. Mr. Benavides went on to point out that, instead of scheduling meetings in such a way that everyone could attend, the OSE instead began unilaterally scheduling meetings without concern to who was able to attend. He stated that when a group of acequia stakeholders went to court over the OSE's methods, a judge agreed with most of the acequias' claims. Mr. Benavides noted that the adjudication of this area has taken so long because of a pattern of delay, appeal and exclusion of a support system for defendants by the OSE. He also acknowledged that the adjudication is a low priority for the OSE.

Mr. Benavides concluded by recommending that the notion of a support staff for adjudication defendants be formalized somehow.

Questions and comments included:

- whether agreements like the one in place in the Taos Valley could work on the San Juan River;
- the need to explore the idea of implementing a better process for completing adjudications in statute;
- the need to quantify the water rights of the Middle Rio Grande Conservancy District;
- whether it makes sense to have water rights claimants come forward with their claims and begin to adjudicate that way, rather than have the OSE try to determine how much water each stakeholder is entitled to;
- problems with the Navajo settlement;
- whether the Water Ombudsman's Office can help reduce the perceived adversarial nature of adjudications;
- limitations on the help that the Water Ombudsman's Office can provide;
- whether it makes sense to begin adjudications by figuring out how much water the largest users are entitled to and working down to the smaller users;

- how much it would cost to adjudicate the whole state;
- cost per defendant on the Rio Chama adjudication;
- appeals process for adjudications;
- whether the Navajo Nation could sell its water from the Navajo settlement to out-of-state parties;
- the number of active adjudications in the state;
- the total number of adjudicated acres versus total number of irrigated acres in the state; and
- OSE staffing levels.

There being no further business, the subcommittee adjourned at 2:00 p.m.